[redacted]

NO. 81573-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Interest of:

ESTEVAN S., JR.
(dob 12/28/91)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY, JUVENILE COURT DIVISION

The Honorable Robert Inouye, Court Commissioner

APPELLANT'S ANSWER TO STATE'S AMICUS BRIEF

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A. PROCEDURAL HISTORY

On May 15, 2007, Yakima County Juvenile Court Commissioner Robert Inouye found Estevan S. had violated the terms of an At-Risk Youth ("ARY") disposition order. CP 12. The commissioner invoked his inherent authority to sentence the youth to "45 days in detention, ... not subject to purge." CP 13. The court did not refer the case to a prosecutor for initiation of proceedings under the criminal contempt statute because it thought a decision from Division Two of the Court of Appeals disallowed it. CP 13 (citing State v. A.L.H., 116 Wn. App. 158, 64 P.3d 1262 (2003)).

The court also concluded that Estevan's substance abuse had "affected Estevan's health," and that he "needs extended inpatient treatment, more than just the basic 28 days." CP 11. It therefore ordered, "Estevan shall attend such inpatient treatment as his parents can arrange." CP 14. His 45-day sentence was suspended on condition of submission to inpatient treatment, and could be purged only upon completion of inpatient treatment followed by six months of "following court orders and remaining sober." CP 14.

Estevan appealed. CP 4-9. He argued, inter alia, that (1) the juvenile court violated the separation of powers doctrine when it resorted to its inherent authority to impose a punitive sanction without explaining why statutory criminal contempt proceedings would be inadequate, and (2) the juvenile court violated due process, the Family Reconciliation Act, and the Involuntary Treatment Act when it invoked its inherent authority to order Estevan to submit to inpatient treatment without finding there was a substantial risk of serious harm and without hearing testimony from any medical experts.

After Estevan filed his opening brief in the Court of Appeals, this Court decided In re Dependency of A.K., 162 Wn.2d 632, 174 P.3d 11 (2007). This Court overruled A.L.H. and held that before a juvenile court may exercise its inherent authority to hold a juvenile in contempt and impose a punitive sanction, it must first find that the statutory remedies for criminal contempt under RCW 7.21.040 are inadequate. Id. at 652 (plurality) and 653 (concurrence).

The Court of Appeals then certified Estevan's case to this Court to answer the following questions:

> [1] Whether In re Dependency of A.K., 162 Wn.2d 632, 174 P.3d 11 (2007) requires that before a juvenile court may exercise its inherent authority to

> impose a punitive sanction, it must first find that the statutory remedies for criminal contempt under RCW 7.21.040 are inadequate; and [2] whether the juvenile court violates the Family Reconciliation Act, ch. 13.32A RCW, when it uses its inherent authority to order a juvenile to submit to inpatient treatment.

(April 30, 2008 Order of Certification). This Court accepted certification on May 19, 2008.

On June 17, 2008, this Court requested an amicus curiae brief from the State of Washington. The State filed its brief on July 30, agreeing with Estevan that A.K. disposes of the first issue, and urging the Court not to reach the second issue.

B. ARGUMENT

1. UNDER A.K., THE CONTEMPT ORDER MUST BE VACATED BECAUSE THE JUVENILE COURT DID NOT FIND STATUTORY CRIMINAL CONTEMPT SANCTIONS INADEQUATE BEFORE EXERCISING ITS INHERENT AUTHORITY TO HOLD ESTEVAN IN CONTEMPT AND IMPOSE A PUNITIVE SANCTION.

The first question certified to this Court is "[w]hether In re Dependency of A.K., 162 Wn.2d 632, 174 P.3d 11 (2007) requires that before a juvenile court may exercise its inherent authority to impose a punitive sanction, it must first find that the statutory remedies for criminal contempt under RCW 7.21.040 are inadequate." Estevan and the State agree that the answer to this question is yes.

In A.K., the plurality stated:

> Because we conclude that statutory criminal contempt sanctions are available for violation of a dependency order, it follows that a juvenile court must find those sanctions inadequate before exercising its inherent contempt power.

A.K., 162 Wn.2d at 652. The concurrence stated:

> I agree with the majority that before a dependency court may exercise its inherent authority to hold a juvenile in contempt and impose a punitive sanction, it first must find that the statutory remedies for criminal contempt under RCW 7.21.040 are not adequate.

Id. at 653 (Madsen, J., concurring).

Thus, the State appropriately reframed the first question for certification as "whether the rule announced in In re A.K. applies in ARY proceedings," as opposed to just dependency proceedings. State's Brief at 2. In answering the question in the affirmative, the State noted that the contempt provisions of the dependency statute and the ARY statute are substantially identical, that they were amended by the same legislation in 1998, and that the general remedial contempt statute by its terms applies equally to ARY and dependency cases. State's Brief at 10-11. The State pointed out that the Legislature's statement of intent with respect to the 1998 amendments mentioned both dependency and ARY cases, and that this Court in A.K. held that the Legislature did not intend to

abrogate the availability of criminal contempt sanctions under RCW 7.21.040 when it enacted these amendments. State's Brief at 11. Thus, A.K.'s holding applies to ARY cases, and requires a juvenile court to find that all statutory contempt remedies are inadequate before exercising its inherent power to impose a punitive contempt sanction.[1] State's Brief at 12.

In this case, Commissioner Inouye did not find the criminal contempt statutory remedy inadequate before exercising his inherent power to impose a punitive sanction. Accordingly, his resort to inherent authority was premature and improper, and the contempt order must be vacated. A.K., 162 Wn.2d at 652.

2. THE JUVENILE COURT VIOLATED DUE PROCESS, THE FAMILY RECONCILIATION ACT, AND THE INVOLUNTARY TREATMENT ACT WHEN IT INVOKED ITS INHERENT AUTHORITY TO ORDER ESTEVAN TO SUBMIT TO INPATIENT TREATMENT.

Because A.K. clearly controls the first question, the main issue in this case is the second question certified to this Court, namely, the propriety of the order requiring Estevan to submit to

[1] The Court of Appeals has already applied the same reasoning to Child in Need of Services ("CHINS") cases as well. See In re the Interest of R.V.M., 141 Wn. App. 263, 268, 169 P.3d 835 (2007) (reversing order of detention as improper use of court's inherent power where trial court did not refer the matter for a statutory prosecution or explain why the statute is inadequate for purpose of punishing criminal contempt).

"more than 28 days" of inpatient treatment. The State addresses the issue briefly, but concludes the Court need not reach it because "the record is not adequate" to address the arguments. State's Brief at 20. But the record is just as developed with respect to this issue as it is for the previous issue, and the violation equally clear.

As noted in Estevan's opening brief, the Family Reconciliation Act, RCW 13.32A.196, prohibits a court from ordering inpatient treatment as part of an at-risk youth proceeding. Appellant's Brief at 25. Furthermore, both due process and the Involuntary Treatment Act, RCW 70.96A.140, bar a court from ordering inpatient treatment unless the court finds, by clear, cogent, and convincing evidence, that the individual is chemically dependent and the dependency creates a serious risk of substantial harm. Appellant's Brief at 23-28.[2] Additionally, RCW 70.96A.140 and RCW 70.96A.245 preclude the imposition of inpatient treatment unless a doctor or other healthcare professional has determined that it is medically necessary. Id.

[2] citing, inter alia, Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); O'Connor v. Donaldson, 422 U.S. 563, 45 L.Ed.2d 396, 95 S.Ct. 2486 (1975); In re Harris, 98 Wn.2d 276, 654 P.2d 109 (1982); Treatment of Mays, 116 Wn. App. 864, 69 P.3d 1114 (2003); Recovery Northwest v. Thorslund, 70 Wn. App. 146, 851 P.2d 1259 (1993).

Here, the court invoked its inherent authority to order inpatient treatment as part of an at-risk youth proceeding, without finding that Estevan had a chemical dependency that created a serious risk of substantial harm, and without hearing the testimony of any medical professionals. CP 10-14. The order was therefore improper under the Family Reconciliation Act, the Involuntary Treatment Act, and the Constitution. See Appellant's Brief at 23-28.

The State disagrees, but does not even address the requirements of due process or the Family Reconciliation Act. The State acknowledges that Estevan was not afforded the protections required under RCW 70.96A.245, but states that if Estevan chose to defy the order, the proper protections would then be provided. State's Brief at 20. It should go without saying that post hoc protections satisfy neither the Constitution nor the statute. Cf. In re Nagle, 2008 Wash. App. LEXIS 2057 (No. 36027-6-II, Filed 8/19/08) (error in contempt order could not be cured by hearing conducted after the sanction was imposed); In re Marriage of Didier, 134 Wn. App. 490, 504, 140 P.3d 607 (2006) (possibility that court "might entertain modification" of an order does not render punitive sanction remedial for purposes of relieving court of its duty

to provide full due process protections). Furthermore, the court did not find the procedure in RCW ch. 70.96A inadequate before resorting to its inherent authority, thereby violating the separation of powers doctrine. In re the Interest of R.V.M., 141 Wn. App. 263, 286-87, 169 P.3d 835 (2007); see also A.K., 162 Wn.2d at 652-53.

The State's argument is also factually inaccurate. The court did not say that if Estevan decided against inpatient treatment, the next step would be to proceed under the statute. Rather, the court invoked its inherent authority to order Estevan to submit to inpatient treatment on pain of imprisonment. CP 14. Accordingly, the State's assertion that "Nothing in the court's order requires an involuntarily [sic] commitment to inpatient treatment" is wrong.

Transferring Estevan to inpatient treatment may well have been the appropriate next step. But it is for the Legislature, not a single judge or commissioner, to determine the procedures for doing so. And it is for a healthcare professional, not a judge or commissioner, to determine whether it is medically necessary (and if so, how long treatment should last). As the A.K. concurrence noted, the Legislature has created statutes for facilitating inpatient treatment. A.K., 162 Wn.2d at 656 (Madsen, J., concurring) (citing RCW 70.96A.140 and .245). Consistent with the Constitution,

these statutes require a showing of substantial risk of serious harm and evaluations by medical professionals. The trial court does not have the authority to circumvent these procedures without specifically finding them inadequate, and does not have the authority to abrogate due process under any circumstances. The order to submit to inpatient treatment must be reversed as an improper invocation of inherent authority and a derogation of due process.

3. THE OTHER ISSUES THE STATE RAISES ARE NOT PRESENTED BY THIS CASE.

a. The sanction in this case is criminal, not civil. The State asks this Court to resolve the issue of whether a court must find the criminal contempt statute inadequate before resorting to its inherent authority to impose a civil contempt sanction. State's Brief at 12-14. In A.K., this Court did not resolve that issue because the sanctions involved were punitive. A.K., 162 Wn.2d at 654. The same is true here, so any attempt to address the State's question would be dicta. See State v. Halgren, 137 Wn.2d 340, 346 n.3, 971 P.2d 512 (1999) (noting that comments that are not required for resolution of a case are dicta).

The sanction in this case was punitive (criminal), because the court imposed it "not to force adherence to its present order ..., but to bolster respect for its future orders." Mead School Dist. No. 354 v. Mead Educ. Ass'n., 85 Wn.2d 278, 286, 534 P.2d 561 (1975). A contempt sanction is civil and remedial rather than criminal and punitive only if "the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order." Hicks v. Feiock, 485 U.S. 624, 635 n.7, 99 L.Ed.2d 721, 108 S.Ct. 1423 (1988).

Estevan was sentenced to 45 days in confinement "not subject to purge." CP 13. The sentence was suspended on the condition that he submit to inpatient treatment for more than 28 days and then follow any future court orders for six months. CP 13-14.[3] There is no question that this constitutes a criminal sentence. See International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 824 n.1, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (fines suspended on condition of future compliance were "criminal in nature"); Hicks, 485 U.S. at 640 n.11 (suspended or probationary

[3] The State's assertion that the sentence was suspended "on the condition that Estevan obey the underlying court order" is inaccurate. State's Brief at 1. The sentence was suspended on condition that Estevan comply with the underlying order plus submit to inpatient treatment, plus comply with future court orders. CP 13-14.

sentence is criminal); In re the Interest of M.B., 101 Wn. App. 425, 456, 3 P.3d 780 (2000) (the "concept of a suspended sentence does not belong in a coercive order"); In re the Interest of J.L., 140 Wn. App. 438, 447, 166 P.3d 776 (2007) ("To be valid, a purge condition must be within the contemnor's capacity to complete at the time the sanction is imposed"). Accordingly, Estevan's case does not present the question of what steps must be taken before invoking inherent authority to order civil remedies.

b. The commissioner did not find statutory remedies inadequate before resorting to his inherent authority to punish Estevan. The State also asks this Court to dictate to lower courts what steps they must take before finding statutory criminal contempt remedies inadequate. State's Brief at 14-16. Like the above issue, this question is not presented here because Commissioner Inouye did not find statutory criminal contempt remedies inadequate before resorting to his inherent authority to impose a punitive sanction. Rather, he did exactly the same thing he did in A.K. – he found statutory criminal contempt remedies "unavailable" under A.L.H., 116 Wn. App. 158. CP 13. Thus, as in A.K., the contempt order should be vacated as a premature and

improper exercise of inherent authority. See A.K., 162 Wn.2d at 652.

If this Court chooses to reach the issue, it should reject the State's proposed rule. The State asks this Court to hold that a juvenile court may resort to its inherent authority to punish a child without first trying the statutory procedure and affording the youth the statute's full panoply of due process protections if, in the commissioner's sole judgment, "the needs of the child, the circumstances [of the] case, and the impact of the statutory sanction on the child" demand resort to inherent authority. State's Brief at 14. Adopting this approach would effectively overrule A.K. and create a serious separation of powers problem.

The reason inherent authority should be exercised sparingly is that it allows a judge to act as prosecutor, adjudicator, and legislator – an extraordinary expansion of power that is "uniquely ... liable to abuse." Bagwell, 512 U.S. at 831. But the State proposes to extend that power to include "social worker" as well. See State's Brief at 16 (Commissioner Inouye should be allowed to circumvent statutory procedures because he is "uniquely qualified to

understand the extent of the family's crisis").[4] This Court should decline the invitation to expand the use of a power that is supposed to be invoked "only under the most egregious circumstances." A.K., 162 Wn.2d 632.

Estevan agrees with the State's assertion that the Legislature intended courts to employ civil remedies before resorting to criminal sanctions. See State's Brief at 15. But the State is wrong in contending that the Legislature intended judges to impose their own views of how children should be punished if civil remedies fail. To the contrary, the Legislature carefully crafted a criminal contempt statute that provides the due process protections required in a punitive setting. RCW 7.21.040. To impose a criminal penalty without these protections constitutes a gross circumvention of both due process and legislative intent.

The Court of Appeals has recently explained the danger in adopting the State's proposed rule, and the propriety of referring a juvenile contempt case to a disinterested public prosecutor under the statute before invoking inherent authority to punish. See R.V.M., 141 Wn. App. 263. "Referral to a prosecutor 'ensures that

[4] This is on top of the "medical expert" role, which Commissioner Inouye usurped so that he could order Estevan to submit to inpatient treatment without hearing testimony from any healthcare professionals and without following the requirements of due process or the relevant statutes. See Section (B)(2) above.

the court will exercise its inherent power of self-protection only as a last resort,' and it also enhances the prospect that investigative activity will be conducted by trained prosecutors." Id. at 283 (citing Young v. United States ex rel. Vuitton et Fils SA, 481 U.S. 787, 801, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)). Proceeding under the statute before resorting to inherent power protects both the rights of the youth and the integrity of judicial proceedings. Id. Furthermore, it ensures the court will not intrude upon the prerogatives of the Legislature. Id. at 286.

The State's totality-of-circumstances proposal is a vague, standardless approach which would only increase the unbridled discretion that led to these unlawful orders in the first place. And contrary to the State's implication that its approach is somehow more benign, the concentration of power to punish in a single individual is dangerous, and, as evidenced here, can result in greater punishment than what would have been possible under the statute – all without the benefit of the proper procedural protections. The commissioner sentenced Estevan to 45 days' detention not subject to purge. CP 13. But if he had followed the statute, he could not have imposed more than 30 days' detention. RCW 7.21.040(5); RCW 13.40.0357; A.K., 162 Wn.2d at 648. And he

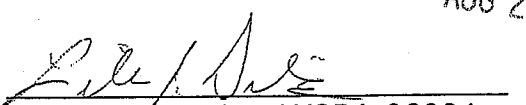
could not have imposed any punishment without first affording Estevan procedural protections not provided here, including referral to a prosecutor and initiation of charges by information. RCW 7.21.040(2). Thus, under the State's proposed rule, both the process and the potential result are less protective of our children's rights and welfare. This Court should decline the State's invitation to undercut A.K.

C. CONCLUSION

For the reasons set forth above and in his opening brief, Estevan S. respectfully requests that this Court vacate the inherent contempt order.

DATED this 28th day of August, 2008.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE INTEREST OF: ESTEVAN S. JR. (DOB 12/28/1991), APPELLANT.	)	NO. 81573-9

CERTIFICATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 28TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF **APPELLANT'S ANSWER TO STATE'S AMICUS BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2008.

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